CREW | citizens for responsibility and ethics in washington

January 15, 2015

Federal Election Commission
Attention: Amy L. Rothstein, Assistant General Counsel
999 E Street, NW
Washington, DC 20463

Re: Comments in Response to Advance Notice of Proposed Rulemaking on Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues

Dear Commissioners:

Citizens for Responsibility and Ethics in Washington ("CREW") respectfully submits these comments in response to the Advance Notice of Proposed Rulemaking ("ANPRM") on Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues, 79 Fed. Reg. 62361 (Oct. 17, 2014) (REG 2014-01). We welcome this opportunity to provide the Federal Election Commission ("FEC" or "Commission") comments on adopting or modifying Commission rules to address corruption and deficiencies in disclosure.

Two campaign finance patterns have emerged in recent years: federal campaign spending is increasing, but disclosure of the people and companies paying for that spending is decreasing. Total spending on federal elections in the 2012 presidential cycle topped $6.28 billion, up from $3.08 billion in 2000, and spending in midterm elections similarly jumped from $2.18 billion in 2002 to over $3.67 billion in 2014.[1] Yet more and more of this spending is done by groups that do not disclose their donors. Dark money spending reported to the FEC came to nearly $175 million in 2014, with close to half of the television advertising in federal races paid for by groups that do not disclose their donors.[2]

As the Supreme Court has said over and over, disclosure of the sources of campaign spending serves several critical public interests. Disclosure provides the public with important information for evaluating campaign ads and other messages supporting or opposing candidates. It also provides citizens and shareholders with the information needed to hold corporations and elected officials accountable for their positions. Disclosure further deters actual corruption and helps avoid the appearance of corruption because knowing that contributions will be made public can discourage those who would use money for improper purposes.[3]

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[1] Open Secrets, Total Cost of Elections, *available at* http://www.opensecrets.org/bigpicture/index.php?cycle=2012.
[2] Open Secrets, Outside Spending by Disclosure, Excluding Party Committees, *available at* https://www.opensecrets.org/outsidespending/disclosure.php; Wesleyan Media Project, Ad Spending Tops $1 Billion, October 29, 2014, at 16, *available at* http://mediaproject.wesleyan.edu/wp-content/uploads/2014/10/2014Release6_FINAL.pdf.
[3] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976); *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 196 (2003); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 370 (2010).

The Federal Election Campaign Act ("FECA") and its amendments require disclosure of donors in many circumstances, but the Commission's regulations frequently fall short of those requirements. CREW strongly urges the Commission to examine and strengthen its rules for disclosure to make them conform with FECA.

In addition, the increased amount of spending can be attributed in part to the Supreme Court's decision in *McCutcheon v. Federal Election Commission* to eliminate aggregate limits on contributions to federal candidates, parties, and political action committees.[4] CREW encourages the Commission to establish strong rules to prevent contributors from abusing this change to circumvent base contributions limits.

I. The Commission Should Amend Its Disclosure Rules To Conform With FECA

The Commission should initiate rulemaking proceedings to address the most blatant deficiencies in the disclosure required of organizations engaged in independent expenditures and electioneering communications. FECA and its amendments explicitly compel far greater disclosure than required by the current regulations. As a result, the FEC's regulations deny the public any information about the individuals and groups funding these political activities, thereby subverting the law.

A. Independent Expenditures

Independent expenditures by organizations that are not political committees constitute the vast majority of dark money spending in federal elections, and have increased significantly in recent years. In the 2008 election cycle, groups that do not disclose their donors spent just $9.6 million on independent expenditures.[5] Following *Citizens United*, that spending jumped to $61.1 million in the 2010 cycle, and $292.8 million in the 2012 cycle.[6] For the 2014 midterms, independent expenditures by non-disclosing groups topped $167.9 million.[7]

For organizations that do not qualify as political committees but make independent expenditures totaling more than $250 in a calendar year, FECA requires disclosure of certain contributors to the organization.[8] First, the statute requires the organization to file "a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person."[9] Subsection (b)(3)(A) requires:

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[4] 134 S. Ct. 1434 (Apr. 2, 2014).
[5] Open Secrets, 2008 Outside Spending, By Group, *available at* https://www.opensecrets.org/outsidespending/summ.php?cycle=2008&chrt=D&disp=O&type=I.
[6] Open Secrets, 2010 Outside Spending, By Group, *available at* https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=D&disp=O&type=I; Open Secrets, 2012 Outside Spending, By Group, *available at* https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=D&disp=O&type=I.
[7] Open Secrets, 2012 Outside Spending, By Group, *available at* https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=D&disp=O&type=I.
[8] 52 U.S.C. § 30104(c)(1).
[9] *Id.*

> the identification of each . . . person (other than a political committee) who makes a contribution to the [organization] during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year . . ., together with the date and amount of any such contribution.[10]

In short, the statute requires the organization to identify each person who made contributions of more than $200 in the calendar year, the date of the contribution, and the amount.

Second, FECA requires the statement filed by the organization making the independent expenditures to include "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure."[11] This requirement is separate from, and cumulative to, the first disclosure requirement.

Contrary to this clear language, the Commission's regulations wrongly limit required disclosure of contributors to organizations making independent expenditures. The regulations require reports to include only "[t]he identification of each person who made a contribution in excess of $200 to the person filing such report, *which contribution was made for the purpose of furthering the reported independent expenditure.*"[12]

This limitation directly conflicts with both contributor disclosure provisions of the statute. The first provision requires identification of "each" person who made contributions in excess of $200 to the organization. This requirement is not limited to contributions made only for the purpose of furthering the reported independent expenditure. At most, this disclosure requirement is limited by FECA's definition of "contribution," which means anything of value given "for the purpose of influencing any election for Federal office."[13]

Further, the regulation's limitation directly conflicts with the statutory requirement to identify each person who makes more than $200 in contributions "for the purpose of furthering an independent expenditure." By using "*the reported* independent expenditure" rather than "*an* independent expenditure," the FEC's regulation substantially limits the disclosure required by the statute.

As a result, under the Commission's regulations, the identity of a contributor who gives to the organization for the broad purpose of influencing a federal election, or even the specific purpose of making independent expenditures, need not be disclosed. Only if the contributor

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[10] 52 U.S.C. § 30104(b)(3)(A).
[11] 52 U.S.C. § 30104(c)(2)(c).
[12] 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).
[13] 52 U.S.C. § 30101(8)(A)(i).

makes a contribution with the purpose of furthering a *specific* advertisement or other independent expenditure must the organization identify the contributor.

In practice, the Commission's drastically underinclusive interpretation of the statute has virtually eliminated the disclosure intended by these provisions of FECA. Organizations that make independent expenditures now hide behind the Commission's regulations to avoid identifying *any* of their contributors. While the Commission regularly sends requests for additional information to these groups, noting their obligation to disclose contributors under the regulations, they inevitably respond they did not receive any contributions for the purpose of furthering the reported independent expenditures.

The Commission's highly restricted standard further makes enforcement difficult. Normally, only a donor or the group receiving a contribution knows whether the money was given to pay for a specific independent expenditure. As a result, in most cases the Commission has little ability to challenge a group's claim that none of its contributions were allocated for particular expenditures. Even where there is evidence these assertions are false, the Commission has not yet acted. Crossroads Grassroots Policy Strategies ("Crossroads GPS"), for example, spent more than $70 million in independent expenditures in the 2012 elections, and explicitly told the Commission in several reports it did not solicit or receive any contributions for the purpose of furthering the independent expenditures it reported.[14] At a Crossroads GPS fundraiser in August 2012, however, Karl Rove, who helped found the group and raises funds for it, told donors an unnamed contributor offered to give the organization a $3 million donation to pay for half of Crossroads GPS's budget supporting Ohio State Treasury Josh Mandel in his challenge to Sen. Sherrod Brown (R-OH).[15] At the same fundraiser, Crossroads GPS showed television ads to the donors targeting Democratic candidates in Senate races, then immediately began fundraising from them.[16] These private statements and conduct directly contradict Crossroads GPS's assertions to the Commission.

Another case involves the Center to Protect Patient Rights ("CPPR"), which made grants to a variety of organizations that made independent expenditures in the 2010 elections.[17] None of those groups disclosed CPPR as a contributor. A news report based on interviews with CPPR's president, however, revealed the organization controlled and coordinated the spending by the groups.[18] CREW has filed complaints in both of these cases, but the Commission has not acted.

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[14] Amended Complaint by Citizens for Responsibility and Ethics in Washington against Crossroads GPS, MUR 6696, filed April 24, 2013, *available at* http://www.citizensforethics.org/legal-filings/entry/crew-amended-fec-complaint-crossroads-gps-failing-to-disclose-donors.
[15] *Id.*
[16] *Id.*
[17] Complaint by Citizens for Responsibility and Ethics in Washington against American Future Fund, Americans for Job Security, 60 Plus Association, Center to Protect Patient Rights/American Encore, Sandy Greiner, Stephen DeMaura, Amy Frederick, and Sean Noble, MUR 6816, filed May 7, 2014, *available at* http://www.citizensforethics.org/legal-filings/entry/crew-complaints-koch-brothers-groups-sean-noble-lying-to-irs-fec.
[18] *Id.*

Compounding the problem, the Commission's disclosure regulations have been used to justify improperly limiting disclosure of electioneering communications. In MUR 6002 (Freedom's Watch, Inc.), three commissioners reasoned that the standards for disclosure of donors or contributors who give to organizations engaged in independent expenditures and electioneering communications "must be construed consistently in both regulations."[19] This reasoning, however, is based on the false assumption that the independent expenditure regulations are proper.

The Commission had the opportunity to address the deficient regulations in 2011, when Rep. Chris Van Hollen (D-MD) filed a petition for rulemaking to correct them.[20] Three commissioners, however, voted not to even proceed with a notice of proposed rulemaking that would have collected public comment on this issue.[21] The Commission should now initiate a rulemaking to conform its regulations with the plain language of FECA and its amendments.

B. Electioneering Communications

Similar to the regulations for independent expenditures, the Commission's regulations for disclosure of donors to organizations that make electioneering communications misinterpret FECA and its amendments. The statute requires organizations that make more than $10,000 in electioneering communications in a year to disclose "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date."[22]

Again, the Commission's regulations fail to comport with the clear language of the statute. While the statute mandates disclosure of "*all* contributors," the regulation narrows that requirement significantly by only requiring disclosure of "each person who made a donation . . . which was made for the purpose of furthering electioneering communications."[23] Even worse, the Commission has misinterpreted this regulation to further limit disclosure. As noted above, in MUR 6002 (Freedom's Watch, Inc.), three commissioners concluded the regulation must be read to apply only to any donation "made for the purpose of paying for the [electioneering] communication *that is the subject of the report.*"[24]

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[19] Statement of Reasons of Chairman Matthew S. Petersen, and Commissioners Caroline C. Hunter and Donald F. McGahn, MUR 6002 (Freedom's Watch, Inc.), at 5.
[20] REG 2011-01, Rulemaking Petition: Independent Expenditure Reporting, filed April 21, 2011.
[21] In re: Draft Notice of Proposed Rulemaking for Independent Expenditure Reporting by Persons Other Than Political Committees, Agenda Document 11-74, Certification of Vote, December 15, 2015.
[22] 52 U.S.C. §§ 30104(f)(2)(E), (F). This requirement applies both to organizations that pay for the electioneering communications out of a separate segregated fund and those that don't.
[23] 11 C.F.R. § 104.20(9).
[24] Statement of Reasons of Chairman Matthew S. Petersen, and Commissioners Caroline C. Hunter and Donald F. McGahn, MUR 6002 (Freedom's Watch, Inc.), at 5 (emphasis in original).

This blatantly disregards the language of both the statute and the regulation, and effectively eliminates the disclosure Congress and the Commission intended. In 2014, for example, outside groups spent more than $8.2 million on electioneering communications, but disclosed donors for only $82,000.[25]

These regulations have been the subject of litigation since 2011.[26] Most recently, the U.S. District Court for the District of Columbia again struck down the regulations as invalid.[27] The Commission has the opportunity to correct its improper interpretation of the statute, and should initiate a new rulemaking to do so.

In addition, FECA requires reporting only of electioneering communications that are "broadcast, cable, or satellite communications."[28] FEC regulations further limit disclosure to communications that are "publicly distributed by a television station, radio station, cable television system, or satellite system."[29] As use of the Internet and other electronic communications technologies has flourished, organizations increasingly are paying for electioneering communications posted exclusively on the web, Facebook, and other Internet-based media. Some of these may be attempts to place more advertisements without having to disclose them to the FEC. The Kentucky Opportunity Coalition, for example, is a nonprofit organization that reported spending more than $7.5 million in 2014 on independent expenditures urging voters to reelect Sen. Mitch McConnell (R-KY) or vote against his opponent, Kentucky Secretary of State Alison Lundergan Grimes.[30] The group also spent $750,000 on a digital ad campaign, most of which ran between September 26, 2014 and Election Day.[31] The ads likely would have been covered as electioneering communications if they ran on broadcast, cable, or satellite television, but because they were distributed exclusively through the Internet, none were reported to the Commission.[32]

The Commission should examine whether the statutory language can be construed to cover electioneering communications carried on the Internet. More than 80 percent of Americans have access to the Internet, over half of them receive it via cable, and even more do through satellite.[33] As a result, the Commission may have the discretion to determine that

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[25] Federal Election Commission, Electioneering Communications Reports, *available at* http://fec.gov/finance/disclosure/ec_table.shtml.
[26] *Van Hollen v. Federal Election Comm'n*, 851 F. Supp. 2d 69 (D.D.C. 2012), *reversed, remanded, and vacated sub nom, Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).
[27] *Van Hollen v. Federal Election Comm'n*, 2014 U.S. Dist. LEXIS 164833 (D.D.C. Nov. 25, 2014).
[28] 52 U.S.C. § 30104(f)(3).
[29] 11 C.F.R. § 100.29(b)(1).
[30] Open Secrets, Kentucky Opportunity Coalition, Targeted Candidates, 2014, *available at* https://www.opensecrets.org/outsidespending/recips.php?cmte=C90014861&cycle=2014.
[31] Press Release, Kentucky Opportunity Coalition, KY Opportunity Coalition Continues Coal Country Digital Ad Campaign, September 26, 2014, *available at* http://kentuckyopportunitycoalition.com/ky-opportunity-coalition-continues-coal-country-digital-ad-campaign/.
[32] *Id.*
[33] Broadband Internet Penetration Deepens in US; Cable is King, *IHS Technology*, December 9, 2013, *available at* https://technology.ihs.com/468148/.

electioneering communications carried through cable and satellite Internet connections must be reported. In any case, in future legislative recommendations, the Commission should encourage Congress to expand FECA to cover electioneering communications transmitted over the Internet.

C. Better Disclosure for Political Committees

Commission regulations also should be revised to make it easier to fully identify political committees and groups that engage in independent expenditures. Many of these groups and political committees provide only post office boxes as their addresses, making it impossible for the Commission or the public to know the correct physical location at which they are conducting business.

FECA requires each political committee to file a statement of organization including the committee's name and address, and the name and address of the treasurer and custodian of books.[34] Commission regulations have similar name and address disclosure requirements for political committees,[35] and further require reports disclosing independent expenditures to include the reporting person's name and mailing address.[36] Neither the statute nor the regulations explain what constitutes a proper address.

On the other hand, FECA and the Commission's regulations require reports of electioneering communications to identify the name of the person making the disbursement for producing and airing the electioneering communications, as well as the filer's "principal place of business," if the filer is not an individual.[37] An increasing number of states require political committees and groups making independent expenditures to disclose their physical address and/or the residential address of their treasurer. Michigan, for example, requires political committees and independent expenditure committees to provide their street address, and specifics "a post office box is not acceptable."[38] Colorado similarly requires physical and mailing addresses of a political committee's principal place of business.[39]

The Commission should initiate a rulemaking to require a political committee to provide the physical street address of its principal place of business. The regulations for disclosure of independent expenditures also should be revised to parallel those for electioneering communications, and require filers who are not individuals to identify their principal place of business.

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[34] 52 U.S.C. § 30103(b).
[35] 11 C.F.R. § 102.2(a).
[36] 11 C.F.R. § 109.10(e)(1)(i).
[37] 52 U.S.C. § 30104(f)(2)(B); 11 C.F.R. § 104.20(c)(1).
[38] Statement of Organization Form for Independent, Political and Independent Expenditure Committees (PACs), Michigan Department of State, Bureau of Elections, Line 5b and Instructions, *available at* http://michigan.gov/documents/PACSofOwithEF_71513_7.pdf?20130816112359.
[39] Colorado Campaign and Political Finance Manual, Colorado Secretary of State, 2014, at 9, *available at* http://www.sos.state.co.us/pubs/elections/CampaignFinance/files/CPFManual.pdf.

II. The Commission Should Rewrite Its Regulations To Close Loopholes Created By *McCutcheon*

The ANPRM also requested comments on whether the Commission should revise its regulations in response to the Supreme Court's decision in *McCutcheon v. Federal Election Commission* that eliminated FECA's aggregate limits on contributions to federal candidates, parties, and political action committees. CREW urges the Commission to initiate rulemaking proceedings to address deficiencies and gaps in the regulations that allow contributors effectively to circumvent the base contributions limits.

A. Affiliation

Commission regulations provide that all affiliated committees share a single contribution limit.[40] Committees established, financed, maintained, or controlled by a single corporation, union, or membership organization, or their subsidiaries, are considered to be "affiliated" under the regulations.[41] The regulations further provide the Commission may examine the relationship between committees established, financed, maintained, or controlled by the same group of persons to determine if they are affiliated.[42] In making this determination, the Commission must consider a set of circumstantial factors, and do so in the context of the overall relationship between the committees.[43]

The regulations creates a loophole, however, by failing to include in the list of factors to be considered whether a committee is run or controlled by a close relative of a candidate. In recent years, close relatives of candidates increasingly have established purportedly unaffiliated independent expenditure-only committees (super PACs) that support the candidate and can accept unlimited contributions. Mothers and fathers of candidates, for example, have established and financed super PACs that exclusively supported their children.[44] Other super PACs have been largely financed by aunts, uncles, and cousins of a candidate.[45]

Despite their purported independence, these super PACs are *de facto* affiliated with the candidate. They allow close family members to circumvent the base limits, and provide an opportunity for other contributors to circumvent those limits and increase their ability to influence the candidate improperly. Even if the super PACs claim not to be affiliated with the candidate, a contributor can be very confident a large donation to a super PAC run by the candidate's parent or sibling will be noticed by the candidate.

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[40] 11 C.F.R. §§ 100.5(g)(2)-(3), 110.3(a)(1)(ii).
[41] 11 C.F.R. §§ 100.5(g)(3)(i)-(iv).
[42] 11 C.F.R. §§ 100.5(g)(4)(i)-(ii).
[43] 11 C.F.R. § 100.5(g)(4)(ii).
[44] *See, e.g.*, First General Counsel's Report, MUR 6611 (Friends of Laura Ruderman); Fredreka Schouten and Christopher Schnaars, Some Super PACs Are A Family Affair, *USA Today*, July 18, 2014; Public Citizen, Super Connected: Outside Groups' Devotion to Individual Candidates and Political Parties Disproves the Supreme Court's Key Assumption in Citizens United That Unregulated Outside Spenders Would Be 'Independent', March 2013.
[45] *Id.*

The Commission should initiate a rulemaking to amend the list of affiliation factors to include whether a political committee, including a super PAC, was established, financed, maintained, or controlled by a member of the candidate's family. Commission regulations already define a member of the candidate's family in the context of personal use of campaign funds,[46] and that definition should be applied to affiliation.[47]

B. Earmarking

FECA provides that all contributions made "either directly or indirectly" by a person on behalf of a particular candidate, including contributions "which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate," are contributions from that person to the candidate.[48] Commission regulations define "earmarked" to mean "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee."[49]

Despite this broad definition, the Commission has found earmarking of contributions only in extremely limited circumstances in which the contributor has explicitly and unquestionably designated the contribution for a particular candidate, and that earmarking is demonstrated by irrefutable documentary evidence. In MUR 4831/5274 (Nixon), for example, the Commission concluded 19 checks given to a state party committee containing the name of a Senate candidate in the memo line were earmarked contributions.[50] Similarly, contributions accompanied by letters stating they were "to aid in" the candidate's campaign and instructing the state party to spend the money on the candidate were treated as earmarked.[51]

The Commission, however, routinely rejects allegations of earmarking even when there is evidence of implicit earmarking agreements or the evidence is strong but circumstantial. The Commission repeatedly has determined in enforcement proceedings that "funds are considered 'earmarked' only when there is clear documented evidence of acts by donors that resulted in their funds being used by the recipient committee on behalf of a particular campaign."[52] In MUR 5445 (Davis), for instance, a donor who had already given the maximum amount to a candidate gave $15,000 to six different political action committees, each of which then made

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[46] 11 C.F.R. § 113.1(g)(7).
[47] The rulemaking also would need to revise 11 C.F.R. § 100.5(g)(5), which was promulgated to codify FEC rulings that authorized committees cannot be treated as affiliated with leadership PACs. The regulation should be revised as: "Notwithstanding paragraphs (g)(2) through (g)(4) of this section, no authorized committee shall be deemed affiliated with any entity that is a leadership PAC, as defined in paragraph (e)(6) of this section."
[48] 52 U.S.C. § 30116(a)(8).
[49] 11 C.F.R. § 110.6(b)(1).
[50] Conciliation Agreement, MUR 4831/5274 (Nixon), at 2. *See also* General Counsel's Report #2, MUR 5783 (Green Party of Luzerne County), at 14-15 (check that designated contribution for Senate candidate in memo line was earmarked).
[51] Conciliation Agreement, MUR 4831/5274 (Nixon), at 2.
[52] *See, e.g.*, Factual and Legal Analysis, MUR 5732 (Matt Brown for Senate), at 6.

contributions to the candidate within nine days of receiving the donor's money.[53] The Commission, however, concluded the contributions were not earmarked because there was no documentation showing the donor instructed the PACs to donate to the candidate, and the Commission credited the affidavits of the respondents denying the earmarking allegations.[54]

Even in MUR 4831/5274 (Nixon), where the Commission found 19 checks to have been earmarked, the Commission did not find earmarking as to another 59 checks the Commission characterized as showing only "indirect or implied indicia of earmarking."[55] While those contributions were made at a time the candidate's committee was soliciting earmarked contributions, and the checks were deposited into the state party's account using deposit slips that containing annotations that mentioned the candidate, the Commission still concluded the contributions were not earmarked.[56] The Commission also has rejected relying on news reports of implicit earmarking agreements.[57]

In *McCutcheon*, the Supreme Court ignored these rulings in concluding the aggregate limits were needed to prevent circumvention of the base limits. According to the Court, a donor that simply "telegraph[ed] his desire to support one candidate" would have earmarked the contributions, and even "implicit agreements" would trigger the earmarking provision.[58] In reality, the Commission currently does not interpret the statute and regulation this broadly, and does not treat this kind of conduct as earmarking.

The Commission, therefore, should initiate a rulemaking to revise the earmarking regulations. At a minimum, the Commission must align its regulations with the Supreme Court's view of conduct that constitutes earmarking. New regulations could be modeled on the current rules used to determine if committees are affiliated. As with the affiliation rules, the regulations should first establish that certain explicit conduct, by definition, constitutes earmarking.[59] Explicitly designating contributions for a particular candidate in the memo line of a check or in correspondence accompanying the contribution, for example, would constitute earmarking. The regulations next should provide that for other cases of alleged earmarking, the Commission will examine the transactions to determine if there is earmarking.[60] The new rules should further require the Commission to consider a set of circumstantial factors in making this determination,

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[53] First General Counsel's Report, MUR 5445 (Davis), at 2-8.
[54] *Id.* at 14-16. *See also* Factual and Legal Analysis, MUR 5968 (John Shadegg's Friends), at 2-3, 5-7 (no earmarking when contributors who gave the maximum to a candidate then gave $5,000 each to his leadership PAC, which made two $5,000 contributions to the candidate less than a month later).
[55] First General Counsel's Report, MUR 5445 (Davis), at 15-16.
[56] *Id.*
[57] Factual and Legal Analysis, MUR 5732 (Matt Brown for Senate), at 7-8 (rejecting earmarking allegation despite treasurer of state party admitting to news media having "struck a deal" for the party to give money to a candidate in exchange for getting the money back from the candidate's supporters); First General Counsel's Report, MUR 5520 (Tauzin), at 3, 7-8 (rejecting news report's allegation of implied earmarking through "some winking and nods").
[58] *McCutcheon*, 134 S. Ct. at 1455.
[59] *Compare* 11 C.F.R. § 100.5(g)(3) (affiliation rules).
[60] *Compare* 11 C.F.R. § 100.5(g)(4)(i).

and to do so in the context of the overall pattern of contributions.[61] Factors should include the timing of contributions, evidence of implicit agreements to circumvent contribution limits, reputable news reports, other circumstantial evidence, and the sworn testimony of respondents and witnesses. Using the broad array of factors will allow the Commission to better determine whether a contribution is earmarked indirectly or impliedly.

Conclusion

Five years ago, the Supreme Court premised its decision in *Citizens United* abolishing restrictions on independent political spending on its expectation of "effective disclosure" of the contributors who paid for that spending.[62] The Commission's current rules, however, subvert FECA's disclosure provisions. CREW strongly urges the Commission to revise these regulations to provide the public with the information about the sources of campaign spending that Congress and the Supreme Court expected. The Commission further must put in place rules to ensure the base contribution limits critical to preventing and deterring corruption are not undermined by opportunities to circumvent those limits made possible by the *McCutcheon* decision.

Sincerely,

Anne L. Weismann
Interim Executive Director
Citizens for Responsibility and Ethics in Washington

[61] *Compare* 11 C.F.R. § 100.5(g)(4)(ii).
[62] *Citizen United*, 558 U.S. at 370.